

BCTT Subcommittee - A.3. Legal Issues and B.1. Land Use Review

Subcommittee Meetings Report

12/27/2022

Charge

1. *A Summary of the County's current rights and obligations to Republic Services, and vice versa, surrounding:*
 1. *The hauling franchise;*
 2. *The landfill CUP; and*
 3. *What legally can and cannot be conditions of any land use approvals (e.g. past compliance, compliance with future laws, codes, and policies, DEQ compliance, reopening, limitations on what can be brought into the County from where, required facilities and practices, reporting/compliance/financial monitoring requirements, etc.)*
 4. *Interpretation and Deference*
2. *A Summary of the rights and obligations of other entities surrounding landfills, hauling, and sustainability initiatives, etc.:*
 1. *Federal;*
 2. *Tribal;*
 3. *State (e.g. Is DEQ prohibited from permitting another landfill west of the Cascades and what does the "regional landfill" designation mean?);*
 4. *Local Government; and*
 5. *Summary of the step-by-step process in ORS chapter 459 and associated timing for the cross-jurisdictional approvals of landfill applications, (e.g. DEQ) including:*
 1. *What topics are within whose authority, and*
 2. *Whether, for example, the County can or should consider the topics it does not have permitting authority over when assessing the criteria outlined in Code section 53.215?*

Charge B: Land Use Review Tasks

1. *Create a common understanding document outlining which Development Code criteria are applicable to the review of a conditional use application for landfill expansion by reviewing:*
 1. *53.215 (Criteria)*
 2. *77.305 (Conditional Uses)*

3. 77.310 (Review)
 4. 77.405 (DEQ)
2. Review Chapters 50 and 51 for context, and then prepare a conceptual list of any other Development Code criteria the WORKGROUP recommends be applicable.
 3. Developing recommended guidelines for interpreting any ambiguous provisions recognizing current statutes, regulations, case law, and County precedent, etc. In doing so, refer to Comprehensive Plan for policy guidance regarding interpretation of any ambiguous Development Code provisions (see, BCC 50.015,) and Review the Planning Commission comments made during its last review of Republic Services' CUP application for context. Examples for consideration include:
 1. The phrase, "Other information as required by the Planning Official" 77.310(e)
 2. The terms found in Section 53.215, e.g.
 3. "seriously interfere"
 4. "character of the area"
 5. "purpose of the zone"
 6. "undue burden"
 7. "any additional criteria which may be required for the specific use by this code."
 8. Other: _____
 4. Develop protocols for the timely and broad distribution of CUP-related information to the public, other governmental entities, and internal committees, groups, and divisions.

Members

Liz Irish
Jeff Condit
Vance Croney
Staff: Greg Verret
Facilitator: Sam Imperati

Meeting #1 Report to BCTT Work Group – 10/27/22

Attendance

Member	Present
Liz Irish	X
Jeff Condit	X

Vance Croney	X
Staff: Greg Verret	X
Facilitator: Sam Imperati	X
Observers:	
Marge Popp	X
Holly Doyle	X
Camille Hall	X
Pam Vaughan	X

Meeting #1: Oct 25, 2022 03:00 – 4:30 PM Pacific Time [Recording](#)

1. Document titled "[Legal Issues & Land Use Review subcommittee - master working document](#)" contains a compilation of work done to date on this topic, by staff and members of the BCTT Workgroup.
2. Vance Croney and Jeff Condit had reviewed the documents generally but committed to closer review in certain areas, which are identified under Next Steps, below.
3. The current Republic Service agreements with the county had been worked on for 2.5 years. That agreement had been parsed and discussed at length in regards to rights and obligations.
4. Past franchise agreements are no longer relevant to the current franchise agreement. All new agreements are all new. There are no conditions carried over from previous agreements.
5. Benton County does not actively monitor compliance with conditions of land use approvals, including at the landfill.
6. Republic Services sets responsibility for compliance with conditions of approval on the landfill manager.
7. Vance Croney confirmed that the County can not limit by conditional use or in any other way who brings trash to the landfill. The only control they have would be a cap on total tonnage into the landfill. Mr. Croney had already prepared a memo on this topic, which will be added to the subcommittee's document.
8. DEQ decides what kinds of waste are prohibited from entering the land fill.
9. Can or should the County consider DEQ permitting topics when assessing the local land use application criteria? (Section A3, Line 12)
 - A) The committee agreed that its role is to answer the legal question ("can the County ..."); the policy question ("should the County ...") was better left to another group.

- B) Also address extent to which County can influence or overlap with state permitting authority. Pre-emption language in DEQ statute limits topics that a local jurisdiction can regulate. By cross-referencing state permit requirements in the conditions of the County's land use approval, the state and local government have more of a tool for enforcement.
- Can the county set a higher threshold for a DEQ-regulated item?
 - State that DSL is in charge of wetlands; they regulate all wetlands that meet the jurisdictional definition
 - Address why can't the county regulate all wetlands, too?
 - Jeff Condit will draft a response to these topics; Greg Verret will fill in additional boxes.

Meeting #2 Report to BCTT Work Group DRAFT – 11/8/22

Attendance

Member	Present
Liz Irish	X
Jeff Condit	X
Vance Croney	X
Staff: Greg Verret	X
Facilitator: Sam Imperati	X
Observers:	
Holly Doyle	X

Working Agenda and Materials

Topic	Lead	Start	Duration	Materials
Welcome and Introductions	Facilitator	3:00	5 mins	
Review Subcommittee Tasks (5 minutes)	Facilitator	3:05	5 mins	Charge
Process Protocols and Goals (5 minutes)	Facilitator	3:10	5 mins	
Review Subcommittee Meetings Report document; suggest modifications	Staff Facilitator	3:15	10 mins	Subcommittee Meetings Report
Work through the Next Steps/Action Items identified in the Subcommittee Meetings Report document, referring to Master Document.	Staff Facilitator	3:25	20 mins	Subcommittee Meetings Report; Master Document

Identify additional Action Items needed to meet subcommittee's charge.	Staff Facilitator	3:45	10 mins	Subcommittee Meetings Report
BCTT Meeting Reports	Facilitator	3:55	5 mins	
Adjourn	All	4:00		

Meeting #2: November 8, 2022 – 3:00pm-4:30pm

1. Group reviewed Meeting Report Document (this document) and concurred with layout, function and content.
2. Worked through the Next Steps/Action Items listed above.
3. Confirmed Action Items A & B:

Mr. Croney and Mr. Condit to submit a memo that would explain further how ambiguous terms are interpreted.

Mr. Croney will draft an answer to “Can the County consider DEQ permitting topics when assessing the local land use application criteria?”

4. Lengthy discussion of Action Item C (Mr. Condit and Mr. Verret will address certain limitations on local authority over state-regulated topics such as wetlands and environmental quality.) Discussion of identifying what product would be most useful to the BCTT and the Board of County Commissioners. Could be a significant undertaking. Decided on a table with brief entries summarizing info covered in different locations in the document with caveats for areas of uncertainty. Identify topics definitively regulated by DEQ, DSL, Benton Co, others, ... and those that are uncertain.

Meeting #3 Report to BCTT Work Group DRAFT – 11/15/22

Attendance

Member	Present
Liz Irish	X
Jeff Condit	X
Vance Croney	X
Staff: Greg Verret	X
Facilitator: Sam Imperati	X
Observers:	

Holly Doyle	X
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Working Agenda and Materials

Topic	Lead	Start	Duration	Materials
Welcome and Introductions	Facilitator	3:00	5 mins	
Review Subcommittee Tasks (5 minutes)	Facilitator	3:05	5 mins	Charge
Review draft summary table of “Who Regulates What” based on discussion at 11/8 meeting	Staff	3:10	10 mins	Will be distributed 11/15; For reference: Master Document
Introductory statement for Past Land Use Decisions Document – review draft from A.2 Subcommittee	Staff	3:20	15 mins	Document distributed via email
Address the topic of “Identify which provisions/conditions of approval of past land use decisions remain in force today.” Note that this topic overlaps with the charge of the A.2 Subcommittee (Past Land Use Application Conditions).	Staff	3:35	15 mins	None prepared.
Address Charge B.4: “Develop protocols for the timely and broad distribution of CUP-related information to the public, other governmental entities, and internal committees, groups, and divisions.”	Staff Facilitator	3:50	10 mins	None prepared.
BCTT 11/17: Subcommittee report-out.	Staff	4:00	5 mins	Subcommittee Meetings Report
Open House 11/17: Determine the focus of the Subcommittee’s table and which members will staff it.	Facilitator	4:05	15 mins	
Next steps on fulfilling charge.	Staff	4:20	5 mins	Subcommittee Meetings Report
Scheduling	Facilitator	4:25	5 mins	
Adjourn	All	4:30		

Meeting #3: Nov 15, 2022 03:00 – 4:30 PM Pacific Time

- Review draft summary table of “Who Regulates What” based on discussion at 11/8 meeting:
 - Draft table seems to be in the right direction. Republic wants chance to review prior to release.

- Need to get group approval for what documents will be made available at the open house.
- Noise standards – County has historically not taken this on. County could hire a specialist or somehow.
- An additional task for this subcommittee is to opine on whether conditions of past approvals are still relevant/applicable. Not same analysis as with franchise agreements, where a new contract (franchise agmt) supersedes the previous contract in full. Land use approvals are fuzzier. Best practice is to clearly state in a land use decision which if any of the prior approval conditions carry over with new approval.
 - Sam requests a memo on this topic: Best practice going forward; what applies from the past decisions.
- Reviewed draft intro statement from A.2 subcommittee. Edits recommended to distinguish between compliance and enforcement; to clarify the legal basis for conditions of approval; and to explain that for all land use decisions, enforcement is typically complaint-driven.
- Agreed on dates for next 2-3 meetings: 11/29, 12/6, 12/13. 3:00-4:30pm.

Meeting #4 Report to BCTT Work Group DRAFT – 11/29/22

Attendance

Member	Present
Liz Irish	X
Jeff Condit	
Holly Doyle (sub for Condit)	X
Vance Croney	X
Staff: Greg Verret	X
Facilitator: Sam Imperati	X
Observers:	
-none-	

Meeting #4: Nov 29, 2022 03:00 – 4:30 PM Pacific Time

DRAFT Working Agenda and Materials

For Reference: [Master Document for Legal & Land Use Issues Subcommittee](#)

Topic	Lead	Start	Durati on	Materials
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Welcome and Introductions	Facilitator	3:00	5 mins	
Introductory statement for Past Land Use Decisions Document – review draft revised by members of both subcommittees	Staff	3:05	20 mins	Sam will provide latest version
Address the topic of “Identify which provisions/conditions of approval of past land use decisions remain in force today.” Note that this topic overlaps with the charge of the A.2 Subcommittee (Past Land Use Application Conditions).	Staff	3:25	35 mins	None prepared.
Address Charge B.4: “Develop protocols for the timely and broad distribution of CUP-related information to the public, other governmental entities, and internal committees, groups, and divisions.”	Staff Facilitator	4:00	15 mins	None prepared.
Address topic of liability after landfill closure.	Facilitator	4:15	10 mins	See email from Marge Popp, sent to BCTT by Sam Imperati 11/27 @ 4:55pm

Topic: Introductory statement for Past Land Use Decisions Document

- Latest compiled draft sent out by Sam today will be reviewed by the Past Approvals subcommittee, then further revised draft will be sent to the Legal/Land Use subcommittee

Topic: Address the topic of “Identify which provisions/conditions of approval of past land use decisions remain in force today.” Note that this topic overlaps with the charge of the A.2 Subcommittee (Past Land Use Application Conditions).

- Jeff Condit or someone in his office will research and prepare a first draft of a white paper on this topic. Holly also involved. Hope to have draft by Meeting #5. Vance has looked into Westlaw and it’s not a black-and-white answer. In past land use decisions, some conditions of approval were clearly specified as continuing on from past decisions; others were not specific, so it’s unclear whether the conditions of approval were superseded or not.
- Goal is to state a general principle, and then identify those that do apply and those that do not.
- Understand that currently applicable conditions of approval could be viewed as a menu for the PC/BOC to choose from for what conditions should apply in the future
- Include advice for going forward: decisions should clearly state which conditions carry forward from past.

Topic: Address Charge B.4: “Develop protocols for the timely and broad distribution of CUP-related information to the public, other governmental entities, and internal committees, groups, and divisions.”

- The public outreach and information subcommittee needs to have the legal requirements to work with. Staff pull out notification requirements from our existing work to summarize legal

requirements around notification; describe default process as well; options that have been used.

Topic: Address liability after landfill closure.

- What are the current requirements and assurances in place?
- DEQ has closure and post-closure requirements. Franchise agreement has requirements, including environmental trust fund. If concern is that VLI tries to sell the landfill, they can't sell the franchise agreement without BOC approval. ORS and OAR spell out the closure process pretty clearly.
- To Do: Summarize the relevant franchise agmt requirements and the DEQ requirements. Holly Doyle will take first shot at this; Vance to review.
- Related question seems to be, what happens if a parent company divests itself of a subsidiary that is responsible for a landfill. Review case that Marge forwarded. Or check with Brian Fuller (DEQ); there may be an Oregon statutory answer to the situation. Holly will contact Brian.

New topic: Do statements in a land use application, in which the applicant says they will do certain things, become binding? Particularly in the absence of a condition specifically listing the things the applicant said they would do.

- A general statement that "the land use shall be established as described in the application" can cover this, but can introduce ambiguity. Best practice would be to state more clearly, as conditions of approval, what is expected in implementation. This should be a key recommendation to the BOC as a best practice, to reduce uncertainty in the future.

Meeting #5 Report to BCTT Work Group DRAFT – 12/6/22

Attendance

Member	Present
Liz Irish	X
Jeff Condit	
Holly Doyle (sub for Condit)	X
Vance Croney	X
Staff: Greg Verret	X
Facilitator: Sam Imperati	X
Observers:	
-none-	

Meeting #5: December 6, 2022 03:00 – 4:30 PM Pacific Time

DRAFT Working Agenda and Materials

For Reference: [Master Document for Legal & Land Use Issues Subcommittee](#)

Topic	Lead	Start	Duration	Materials
Welcome and Introductions	Facilitator	3:00	5 mins	
Introductory statement for Past Land Use Decisions Document – review draft further revised by A.2 subcommittee.	Staff/ Facilitator	3:05	30 mins	“CUP Introductory Language 12-2-22 Draft...” sent by email 12/6/22
Review list of action items. Address items that can be dealt with in the meeting. Identify homework!	Staff	3:35	40 mins	Subcommittee Meetings Report
Next steps on fulfilling charge.	Facilitator	4:15	10 mins	Subcommittee Meetings Report
Adjourn (use your extra 5 minutes wisely!)	All	4:25		

Committee reviewed revised introductory statement for Past Land Use Decisions Document and discussed a) how much narrowing of the issues had occurred (significant agreement on the text between the two committees) and b) a couple areas needing further refinement. Edited version for Facilitator to continue working with A.2 subcommittee on.

Reviewed action item list and established plan for addressing remaining items.

Reviewed preparation for Dec 15 workgroup meeting:

Send updated master doc to full workgroup by 12/12 at latest

Send to Sam end of Thursday 12/8

45 min presentation: Where we are, what we've covered

The X number of key determinations – as a powerpoint, ideally

Sam will prepare a template

High-level overview of the key determinations, then:

1. Ask the workgroup: Which of these do you want more info on?
2. Ask the workgroup: Are there any that are different than you were thinking?
3. Describe the issues we're working on next.
4. Ask the workgroup: Are there other questions you don't see on our plate that you think should be?

Meeting #6 Report to BCTT Work Group DRAFT – 12/13/22

Attendance

Member	Present
Liz Irish	X
Jeff Condit	
Holly Doyle (sub for Condit)	X
Vance Croney	X
Staff: Greg Verret	X
Facilitator: Sam Imperati	X
Observers:	
-none-	

December 13, 2022 BCTT Subcommittee –

Legal & Land Use Issues

Agenda

Meeting #6: December 13, 2022 03:00 – 4:30 PM Pacific Time

<https://meet.goto.com/454802405>

You can also dial in using your phone. United States: +1 (408) 650-3123

Access Code: 454-802-405

Meeting will be recorded

DRAFT Working Agenda and Materials

For Reference: [Legal Issues & Land Use Review subcommittee - master working document v6](#)

Topic	Lead	Start	Duration	Materials
Review Agenda	Facilitator	3:00	5 min	

Presentation for Dec 15 BCTT Workgroup Mtg	Liz	3:05	40 min	1 st draft attached (emailed by Liz 12/11/22)
Closure/Post-Closure Obligations	Holly	3:45	20 min	Memo attached (emailed by Holly 12/13/22)
Relevance of applicant statements	Vance/Greg	4:05	10 min	Page 47 in Master Document (incorporated from Vance's 12/1/22 email titled "Aspirational promises")
Introductory statement for Past Land Use Decisions Document – review draft further revised by A.2 subcommittee.	Staff/ Facilitator	4:15	10 min	???
Next steps on fulfilling charge.	Facilitator	4:25	5 mins	Subcommittee Meetings Report
Adjourn	All	4:30		

Presentation for Dec 15 BCTT Workgroup Mtg

Sam suggests presenting information, then asking:

Questions for clarification?

Anything you see missing?

Any conclusions that you object to?

Group reviewed draft slides and notes, had discussion. Liz will finalize and present at BCTT workgroup.

Closure/Post-Closure Obligations

DEQ's safety net is robust; helps ensure an uneventful landfill closure/post-closure.

Financial assurances required

Relevance of applicant statements

Group decided that a group discussion was not necessary.

Introductory statement for Past Land Use Decisions Document – review draft further revised by A.2 subcommittee

Other subcommittee wants to have a joint meeting to discuss paragraph in question. Will schedule for after Jan 1.

Also, topic of 1983(?) CUP: Was current practice of conditions needing to be self-contained in place in 1983? Totality of decision seems to require compliance with a submitted map/plan, per CUP subcommittee.

DRAFT

Running List of Action Items

- A. Mr. Croney and Mr. Condit to submit a memo that would explain further how ambiguous terms are interpreted.
 - ✓ *Completed 11/2/2022. See Page 19 of master document.*
- B. Mr. Croney will draft an answer to “Can the County consider DEQ permitting topics when assessing the local land use application criteria?”
 - ✓ *Completed 11/2/2022. Response inserted in Section A3, Line 12, of the master document.*
- C. Mr. Condit and Mr. Verret will address certain limitations on local authority over state-regulated topics such as wetlands and environmental quality. Present as a summary table.
 - *Draft begun; see Page 16 of master document. Staff to continue populating table, then subcommittee review.*
- ~~D. Both Mr. Croney and Mr. Condit will be reviewing all previous documents to be sure they have all been updated.~~
 - ✓ *Deleting, as this action is assumed part of final review by subcomm*
- E. Mr. Condit will review the franchise agreement portions of Section A2 and submit any markups (tracked changes).
- F. Add number of franchise agreements there have been, the current ones are the ones that control, and those are the ones discussed herein.
 - ✓ *Added statement to Page 3 of master document. Did not list number of past agreements as that appears to be irrelevant.*
- G. County staff review "What legally can and cannot be conditions of any land use approval."
 - ✓ *Drafted by Vance Croney and Jeff Condit; see Page 12 of the master document. Confirm: does this replace original version (from Republic Services 9/30/22)? Need Jeff Condit to review/discuss.*
- H. Incorporate Mr. Croney’s previous memo on the topics of “Can Benton County prohibit solid waste generated outside the county from being deposited at Coffin Butte landfill?” and “What effect does the regional landfill designation have?”
 - ✓ *Completed 11/2/2022. See Page 12 and Page 31 of the master document.*
- I. Identify which provisions of past franchise agreements decisions remain in force today.
 - ✓ *Completed 12/6/22. See Page 3 of master document.*

- J. Address which provisions/conditions of approval of past land use decisions remain in force today. Identify best practice for the County going forward and discuss what applies from the past decisions.
- ✓ *Memo submitted by Jeff Condit and Vance Croney. Incorporated into master document; see Page 3.*
 - *Does the memo sufficiently address this topic? Two points: 1) the memo describes the Board of Commissioners as making the determination of whether previous conditions remain in force; however, in practical terms this question is more often determined by the Planning Official where the majority of land use actions are decided. 2) The BCTT will likely want to produce a list of currently applicable conditions of approval; this memo provides a legal framework for that determination, but who is going to produce the list?*
- K. Elaborate on the 150-day time limit for rendering a final land use decision (currently addressed under Charge B, Background (Page 35) of the master document). What options exist in how the County processes a land use application that could facilitate meaningful public input to the decision-making process? [Request from Facilitator]
- ✓ *Draft added to master document (Page 48); subcommittee review needed (offline).*
- L. Add Charge B.4: “Develop protocols for the timely and broad distribution of CUP-related information to the public, other governmental entities, and internal committees, groups, and divisions.”
- *Section drafted. See Page 51 of the master document. Priority Item to enable Subcommittee E to start.*
- M. Introductory statement for Past Land Use Decisions Document
- *Reviewed and returned to B.2 subcommittee.*
- N. Address liability after landfill closure. Address what happens if a parent company divests itself of a subsidiary that is responsible for a landfill.
- ✓ *Memo submitted by Jeff Condit and Vance Croney. Incorporated into master document; see Page 4 and Appendix A.*
- O. Do statements in a land use application, in which the applicant says they will do certain things, become binding?
- *Draft on Page 47, based on Croney email 12/1/22. Subcommittee should review.*
- P. New: Address “Other information as required by the Planning Official.” List topic areas considered by Planning Commission in 2021 CUP decision. Add to Section B.3.
- Q. New: Address how 2002 MOU informs questions of the relevance of past land use approvals.

Relevant Documents

- [DRAFT Report Common Understandings: Republic Services and Benton County's Current Rights and Obligations \(IV.A.2\)](#)
- [DRAFT Report Common Understandings: Other Entity Rights and Obligations \(IV.A.3\)](#)
- [County Counsel Deference Memo](#)
- [Staff Memo - Charge B - Dev Code Provisions](#)
- [DRAFT Report Common Understandings: Reporting requirements \(IV.A.1.E\)](#)
- [Common Understandings Feedback - Republic 9-30-22](#)
- [Common Understandings Feedback \(Attachment A\) - Republic Services 9-30-22](#)
- [Master Working Document - Legal Issues and Land Use Review Subcommittee; \(Click Here to Download Word Version\)](#)
- [BCTT Tours Q&A - 10/30/22](#)
- [Fuller - 11/3/22 - Regional Disposal Site Statutes](#)